

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

MEMORANDUM AND ORDER

On January 22, 2019, Kenneth Bey, an inmate at Silverdale Detention Center in Chattanooga, Tennessee, filed a *pro se* pleading against government officials under the caption “Affidavit of Fact Writ of Discovery Appeal/Complaint” (Doc. No. 1), which the court construed as a civil rights complaint under 42 U.S.C. § 1983. However, the plaintiff failed to either pay the filing fee or file a proper application to proceed *in forma pauperis* (IFP) under 28 U.S.C. § 1915(a).

The court therefore entered an order on February 22, 2019, directing the Clerk to mail the plaintiff a blank IFP application form, and directing the plaintiff to either pay the fee or submit his IFP application within 28 days of entry of the order. (Doc. No. 3.) The order explicitly warned the plaintiff that if he did not timely comply with this directive or seek an extension of the deadline before it passed, or if he failed to promptly notify the court of any change in his address, his case might be dismissed. (*Id.* at 2.)

To date, well past the 28-day deadline, the plaintiff has failed to pay the filing fee, file an IFP application, or request an extension of time in which to do so. Moreover, the court's mailings have been returned by the postal service with the notation that they are undeliverable at the address provided by the plaintiff. (Doc. No. 5.)

The plaintiff's failure to comply with the court's order requires the dismissal of this action. Federal Rule of Civil Procedure 41(b) states that, “[i]f the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it.” Fed. R. Civ. P. 41(b). Moreover, “[i]t is clear that the district court does have the power under Rule 41(b), Fed. R. Civ. P., to enter a *sua sponte* order of dismissal.” *Carter v. City of Memphis*, 636 F.2d 159, 161 (6th Cir. 1980) (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962)). Dismissal of this action is appropriate in view of the plaintiff's fault in failing to comply with the court's order, despite having been warned that such failure would lead to dismissal. *Choate v. Emerton*, No. 2:16-cv-00037, 2018 WL 3656505, at *2 (M.D. Tenn. Aug. 2, 2018), *report and recommendation adopted*, 2018 WL 4076955 (M.D. Tenn. Aug. 27, 2018). Under Rule 41(b), dismissal for failure to prosecute can be either with or without prejudice. In view of the plaintiff's *pro se* status, as well as the preference for disposing of cases on their merits, the court finds dismissal without prejudice to be the appropriate disposition here. *See id.* (citing *Mulbah v. Detroit Bd. of Educ.*, 261 F.3d 586, 591 (6th Cir. 2011)).

Accordingly, this action is **DISMISSED WITHOUT PREJUDICE** for want of prosecution and for failure to comply with the court's order.

The filing fee is nevertheless to be assessed against the prisoner in this circumstance. *In re Prison Litig. Reform Act*, 105 F.3d 1131, 1132 (6th Cir. 1997) (“If the prisoner does not comply with the district court's directions [to file a properly supported IFP application], the district court shall presume that the prisoner is not a pauper, and assess the inmate the full amount of fees.”). Accordingly, the entire \$400.00 fee is hereby **ASSESSED**, as follows:

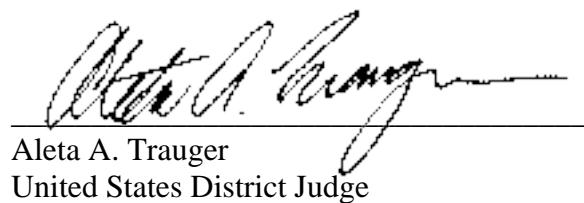
The warden of the facility in which the plaintiff is currently housed, as custodian of the plaintiff's trust account, is **DIRECTED** to submit to the Clerk of Court, as an initial payment, the

greater of: (a) 20% of the average monthly deposits to the plaintiff's credit at the jail; or (b) 20% of the average monthly balance to the plaintiff's credit for the six-month period immediately preceding the filing of the complaint. 28 U.S.C. § 1915(b)(1). Thereafter, the custodian shall submit 20% of the plaintiff's preceding monthly income (or income credited to the plaintiff for the preceding month), but only when the balance in his account exceeds \$10.00. 28 U.S.C. § 1915(b)(2). Payments shall continue until the \$400.00 filing fee has been paid in full to the Clerk of Court. 28 U.S.C. § 1915(b)(3).

The Clerk of Court **MUST** send a copy of this order to warden of the facility where the plaintiff is housed to ensure compliance with that portion of 28 U.S.C. § 1915 pertaining to the payment of the filing fee. If the plaintiff is transferred from his present place of confinement, the custodian must ensure that a copy of this order follows the plaintiff to his new place of confinement, for continued compliance with the order. All payments made pursuant to this order must be submitted to the Clerk of Court for the United States District Court for the Middle District of Tennessee, 801 Broadway, Nashville, TN 37203.

This is the final order denying all relief in this case. The Clerk **SHALL** enter judgment. Fed. R. Civ. P. 58(b).

It is so **ORDERED**.



Aleta A. Trauger
United States District Judge